

## DEPARTMENT OF STATE REVENUE

04-20190121.LOF  
04-20190122.LOF  
04-20190123.LOF**Letter of Findings: 04-20190121; 04-20190122; 04-20190123  
Gross Retail and Use Tax  
For the Years 2015, 2016 and 2017**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

**HOLDING**

Combination Convenience Store/Gas Stations were unable to meet their burden of establishing that any portion of the Department's sales and use tax assessments, based on the best information available, were wrong; Convenience Store/Gas Stations failed to provide documentation which would have refuted the assessment.

**ISSUE****I. Gross Retail and Use Tax - Estimated Gasoline and Convenience Store Sales.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-2-1(b); IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-5 et seq.; IC § 6-2.5-9-3; IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c); *Dep't. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-5-1](#).

Taxpayer argues that the Department's assessment of additional sales and use tax is excessive on the ground that the Department erroneously relied on extraneous evidence to justify the audit assessments.

**STATEMENT OF FACTS**

Taxpayer operates three Indiana combination gas station and convenience stores. Taxpayer sells fuel through metered pumps. The convenience stores sell tobacco, candy, snack food, dairy products, grocery items, automotive goods, household goods, and the like.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's sales tax returns and business records. As a preliminary matter, the Department notified Taxpayer's individual owner of the audit in March 2018. The Department again contacted Taxpayer's owner in June 2018 requesting financial, purchase, and sales record by September 2018. Taxpayer failed to respond and was again notified of the document request in September 2018. Taxpayer did not respond. As explained in the audit report prepared in December 2018, "[A]s of today, the [T]axpayer has not cooperated and brought in any records."

In the absence of the requested records, the Department examined records available from different Indiana convenience/gas station businesses owned and operated by the same individual. The Department had previously determined that - based on point-of-sales reports - these separate businesses had underreported sales "by \$5,000 to \$9,000 each month and usually in even amounts." Working from the available information, the Department projected taxable sales, prepared three audit reports, and assessed the additional tax to the three business locations here at issue.

Taxpayer disagreed with the assessment and submitted a protest to that effect. A hearing was scheduled in order to provide Taxpayer an opportunity to further explain the basis for the protest. The hearing was originally scheduled for March 2019. The March hearing was postponed and rescheduled to April 2019. The April hearing was postponed and rescheduled to May 2019. The May hearing was postponed and rescheduled to October 2019. Ultimately, Taxpayer asked that the Department enter into a settlement agreement addressing and resolving the disputed sales and use tax assessments. Although both the Department and Taxpayer reached an agreement on the amount to be paid, Taxpayer declined to execute the agreement because the terms of the draft

agreement were unacceptable.

This Letter of Findings is written in response to Taxpayer's original protest. For simplicity's sakes, this Letter of Findings refers to the three convenience stores and their owner as "Taxpayer."

## **I. Gross Retail and Use Tax - Estimated Gasoline and Convenience Store Sales.**

### **DISCUSSION**

The issue is whether the Department's assessment of additional sales/use tax is overstated and challenging the audit's "reliance on extraneous evidence to support [the] adjustments . . . ." Taxpayer states that it "maintained adequate books and records during the tax years in question and . . . that a careful examination of such records will result in a finding of either no additional tax due or a significant reduction in the amount of the liabilities . . . ."

As a threshold issue, it is the Taxpayer's responsibility to establish that the tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. The Department points out that, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dep't. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1.

A retail merchant - such as a convenience store - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." IC § 6-2.5-9-3.

A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Taxpayers are required to keep and maintain business records. "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times."

In the absence of contemporaneous records, the Department is required by law to issue an assessment based upon whatever alternative means may be available. IC § 6-8.1-5-1(b) provides in relevant part that "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment *shall* make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." (*Emphasis added*). See also [45 IAC 15-5-1](#).

In this case, Taxpayer disputes the audit's finding that it had underreported the sales at its three locations by approximately 45 percent. In particular, Taxpayer criticizes the reliance on sales figures determined at a different, but related business. Taxpayer believes that it maintained adequate sales records and "that a careful examination of such records [would] result in a finding of either no additional tax due or a significant reduction in the amount of the liabilities . . . ." However, throughout the protest process, Taxpayer failed to provide "verifiable records" to support that assertion.

The Department is unable to agree that Taxpayer has met its statutory burden under IC § 6-8.1-5-1(c) of establishing that the assessment was "wrong." Instead, Taxpayer criticizes the Department's reliance on what Taxpayer characterized as "extraneous evidence." However, in the absence of source documentation required

under IC § 6-8.1-5-4(a) and the Taxpayer's failure to permit the audit review of that documentation as required under IC § 6-8.1-5-4(c), the audit was placed in the position of making an assessment based on the "best information available."

The Department finds no evidence that Taxpayer was denied the opportunity to provide the requested documentation or that the amount of the assessment was arbitrary or totally unsupported. Instead, the Department did what it is required to do pursuant to IC § 6-8.1-5-1(b) in reliance on the best information available.

#### **FINDING**

Taxpayer's protest is respectfully denied.

December 13, 2019

*Posted: 04/01/2020 by Legislative Services Agency*

An [html](#) version of this document.